No. 02-3087

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & CO KG,
AND OSTERREICHISCHE INDUSTRIEHOLDING, AG

Petitioners.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA
IN SUPPORT OF PETITIONERS

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INTRODUCTION

Plaintiffs are Austrian Jews and their descendants who brought suit against the Republic of Austria and Austrian companies for injuries arising out of Nazi atrocities between 1938 and 1945. See 2nd Amended Compl. ¶ 2. At the time plaintiffs' claims arose, foreign states were afforded virtually absolute immunity from suit in American courts. Prior precedent of this Court establishes that subsequently adopted exceptions to the doctrine of foreign sovereign immunity do not apply retroactively to reach any of the conduct here and that Austria is immune from suit on plaintiffs' claims. On the strength of this precedent, Austria – supported by the United States – moved to dismiss the claims against it.

The district court refused to grant Austria's motion. First, the court called into question the continuing validity of Second Circuit precedent regarding retroactive application of the FSIA. It then held that, even if this retroactivity precedent remained valid, plaintiffs could circumvent that rule simply by alleging that Austria continues to deny compensation on claims that are themselves barred by immunity. See Order of June 5, 2002, at 2-3.

Having rejected Austria's legal arguments, the district court proceeded to order Austria to engage in discovery to determine whether it might be entitled to immunity on other grounds. Austria moved the court to reconsider, noting that the

policies underlying foreign sovereigns' immunity from suit would be severely undermined if foreign governments could be forced to participate in extensive discovery with respect to claims that are barred as a matter of law. On October 21, 2002, the district court denied the motion.

The district court's failure to recognize Austria's immunity from suit is particularly troubling in the context of these Nazi era claims, which have been the subject of international negotiations and agreements between the United States and Austria. As the United States informed the district court, the United States and Austria have entered into an executive agreement, which led to the establishment of Austria's General Settlement Fund ("GSF"), which will make payments to certain victims of the Nazi era, including the proposed plaintiff class, whose property was confiscated or "Aryanized." See United States' Statement of Interest, filed October 2001 (attached hereto).[1] As the United States indicated below, the United States' strong interests in the success of the GSF support

[1] The history of the executive agreement relating to the GSF and its terms are more fully detailed in the United States' Statement of Interest at pp. 1-15. The executive agreement with respect to Austrian Nazi-era property claims is similar in relevant respect to the German Foundation Agreement that was at issue in In re Austrian and German Holocaust Litig., 250 F.3d 156 163-64 (2d Cir. 2001), in which the Court issued a writ of mandamus directed to the district court based upon the district court's attempt to interfere with the Executive Branch's conduct of foreign policy.

dismissal of these claims on any valid legal ground, and Austria's sovereign immunity is one such ground.[2]

The executive agreement makes clear that the United States believes the GSF should be the exclusive remedy for all such claims and that the United States' foreign policy supports an "all-embracing and enduring legal peace" for Austria and Austrian companies with respect to claims such as plaintiffs' in favor of the remedy provided by the GSF. Exchange of Notes at 2 (reprinted in the Addendum). The United States has undertaken to inform American courts of this policy and, in particular, to "take appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to any claim that may be asserted against the Republic of Austria involving or related to" claims covered by the fund. See Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation" ("Reconciliation Fund Agreement"), Arts. 2(2) and 3(3) (reprinted in the Addendum), incorporated by reference by Exchange of Notes. As the United States informed the district court, payments under the fund will not begin until all prior

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[2] The Executive Branch, in an exercise of its exclusive prerogative under Article II of the United States Constitution to recognize foreign governments, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964), has determined that Austria was a sovereign state during the Nazi era – from the Anschluss in March 1938 through May 1945 – and is entitled to sovereign immunity on the same terms as any other recognized government. See Declaration on Austria at Moscow, quoted in Sen. Exec. Rpt. No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955).

litigation pending in U.S. courts has been dismissed. Exchange of Notes, Annex A, ¶ 2. The continued pendency of plaintiffs' claims would impede the success of this important foreign policy initiative.

This Court should direct the district court to dismiss plaintiffs' claims against the Republic of Austria for lack of jurisdiction.

SUMMARY OF ARGUMENT

1. Austria is entitled to immunity from suit on plaintiffs' Nazi-era claims. Each of the three bases upon which plaintiffs assert jurisdiction over the Republic of Austria is precluded by settled law.

a. In Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988), the Court held that the "commercial activity" exception to the FSIA does not apply retroactively to conduct that took place prior to the State Department's adoption of the "restrictive theory" of immunity in 1952. Id. at 27. Although the district court called into question the continued vitality of Carl Marks's holding, the correctness of the Court's retroactivity analysis in that decision has, in fact, been confirmed by subsequent Supreme Court decisions. Moreover, the rule against retroactivity articulated in Carl Marks cannot be circumvented, as the district court indicated, merely by pleading that Austria has continued, since 1952, to deny compensation for its pre-1952 conduct. A foreign

sovereign's refusal to pay on claims as to which it enjoys immunity does not constitute an independent claim over which the district court can exercise jurisdiction under the FSIA.

b. The rationale of Carl Marks also compels the conclusion that the expropriation exception to the FSIA does not apply to conduct during the Nazi era. Indeed, even under the restrictive theory of immunity, foreign sovereigns continued to enjoy immunity from suit arising out of the expropriation of property within their territory. See Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2d Cir. 1971). Nor can Austria's continued refusal, since the FSIA's enactment, to return previously expropriated property serve as the basis for exercising jurisdiction over plaintiffs' claims.

c. Finally, this Court has already rejected plaintiffs' theory that a sovereign's violation of peremptory norms of international law, referred to as jus cogens, should be deemed an implied waiver of its immunity. In Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996), the Court considered and rejected that very argument, holding that "Congress's concept of an implied waiver * * * cannot be extended so far." Id. at 244. Nor does Austria's entry into an executive agreement that commits the United States to supporting Austria's right to immunity constitute a waiver of that immunity.

2. The district court's failure to recognize Austria's entitlement to immunity warrants interlocutory review by this

Court, either under the collateral order doctrine or as an exercise of the Court's mandamus power. The district court order is an effective denial of Austria's motion to dismiss on the grounds of sovereign immunity. Under the collateral order doctrine, this Court should exercise interlocutory review over that denial. Alternatively, the Court should exercise its power of mandamus. Austria should not be forced to undergo extensive factual discovery where settled law establishes its entitlement to immunity from the burdens of litigation.

Indeed, the need for prompt corrective action by this Court is especially clear here, where plaintiffs' claims have been the subject of international negotiations and an agreement in which the United States committed to supporting Austria's assertion of its sovereign immunity and where the continued pendency of plaintiffs' claims could well further delay dignified payments to victims of the Nazi era under the GSF.

ARGUMENT

I. AUSTRIA IS IMMUNE FROM SUIT ON PLAINTIFFS' CLAIMS IN THE COURTS OF THE UNITED STATES.

Plaintiffs assert claims against the Republic of Austria arising out of atrocities committed against Austrian Jews in Austria during the Holocaust. See First Amended Compl. ¶ 2 ("This action is brought on behalf of all present and former citizens and residents of Austria of Jewish descent who, in and after 1938 and prior to on or about May 8, 1945, were victims of Nazi persecution (the 'Jewish Victims of the Holocaust')").

Plaintiffs contend that the district court has jurisdiction under three exceptions to the FSIA's general rule that foreign governments are immune from suit in United States courts: commercial activity, id. § 1605(a)(2); expropriations in violation of international law, id. § 1605(a)(3); and waiver, 28 U.S.C. § 1605(a)(1). See 1st Amended Compl. ¶¶ 44, 95, 99 (pages 49-50); 2nd Amended Compl. ¶¶ 49-58. As a matter of law, none of these exceptions could serve as the basis of jurisdiction over plaintiffs' Nazi-era claims.

A. As This Court Held In Carl Marks, The Commercial Activity Exception Does Not Apply To Plaintiffs' Claims.

1. Carl Marks recognized that prior to 1952, foreign governments had a "settled expectation, rising to the level of an antecedent right, of immunity from suit in American courts." 841 F.2d at 27. From The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity," pursuant to which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (reprinting Letter of Acting Legal Adviser Jack B. Tate ("Tate Letter"). See also Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

This policy changed when "the State Department issued the 'Tate Letter' in 1952, adopting the 'restrictive theory' of sovereign immunity." Carl Marks, 841 F.2d at 27. See also

Alfred Dunhill, 425 U.S. at 711 (reprinting Tate Letter). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts, and not for their commercial acts. See Verlinden, 461 U.S. at 486-87; Carl Marks, 841 F.2d at 27. As explained in the Tate letter, the State Department's adoption of the restrictive theory reflected an increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill, 425 U.S. at 714 (reprinting Tate Letter).

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Verlinden, 461 U.S. at 488. The FSIA sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states only if the suit comes within one of the specific

exceptions to that rule established by Congress. See id. §§ 1605-07.

By adopting a statute to govern comprehensively the question of foreign sovereign immunity, Congress intended to relieve the State Department of the diplomatic pressures associated with case-by-case decisions and to establish legal principles to guide the courts. See Verlinden, 461 U.S. at 488. The FSIA now "'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

2. In Carl Marks, the Court specifically held that the FSIA's commercial activity exception does not apply retroactively to claims that arose prior to the 1952 Tate Letter, when courts would not have exercised jurisdiction over them. The Court recognized that "only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." Carl Marks, 841 F.2d at 27 (citation omitted). Thus, to apply the FSIA's commercial activity exception to pre-1952 conduct "would affect adversely [foreign governments'] settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts." Ibid. See also Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns").

3. In its order rejecting Austria's claim to sovereign immunity, the district court questioned the continued vitality of Carl Marks. See Order of June 5, 2002, at 2-3. The district court further held that plaintiffs could avoid the effect of Carl Marks by alleging that Austria had refused, post-1952, to make adequate compensation for pre-1952 wrongs. See id. at 3 (citing 1st Amended Compl. at ¶¶ 16-18, 24 (alleging an official policy "to delay, impede, thwart and at any cost avoid and evade restitution or recompense to Austria's Jews" for wrongs committed during the 1938-45 period)). The district court was wrong on both counts. Subsequent decisions by the Supreme Court have confirmed that this Court's analysis and holding in Carl Marks was correct. And plaintiffs cannot circumvent the rule in Carl Marks merely by pleading that Austria continues to deny compensation on claims as to which it enjoys sovereign immunity.

a. Since Carl Marks, the Supreme Court has confirmed that a change in the law that "eliminates a defense to * * * suit" affects "the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. Hughes Aircraft Co. v. United States, 520 U.S. 939, 948 (1997). Hughes concerned an amendment to the False Claims Act that allowed a qui tam relator to bring a claim that previously could only be brought by the United States. The Supreme Court held that a statute allowing the courts to exercise jurisdiction over a private claim that could previously only have

been brought by the government affects substantive rights and "is as much subject to our presumption against retroactivity as any other." Id. at 951.

The district court cited to Landgraf v. USI Film Prods., 511 U.S. 244 (1994), as raising doubt as to the correctness of Carl Marks's holding. Prior to the Supreme Court's decision in Hughes, some courts (such as the Ninth Circuit in that case) had construed Landgraf as creating a presumption in favor of retroactively applying jurisdictional statues. See, e.g., United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1517 (9th Cir. 1995).

In Hughes, however, the Supreme Court specifically rejected that misinterpretation of Landgraf. See Hughes, 520 U.S. at 950-51. The Supreme Court held that a new jurisdictional provision that affects substantive rights is "subject to our presumption against retroactivity." Id. at 951 (emphasis added). Absent a clear congressional statement to the contrary, the courts will presume that Congress did not intend to create jurisdiction over claims that would not have been heard at the time they arose. See Immigration and Naturalization Service v. St. Cyr, 121 S. Ct. 2271, 2288-89 (2001) (statutes "will not be construed to have retroactive effect unless their language requires this result").

The Supreme Court has also clarified how that presumption applies to a given statute in which some provisions do not affect substantive rights while others do. In such a case, the Court

held, the retroactivity analysis must be undertaken on a provision-by-provision basis. Thus, in St. Cyr, the Court analyzed the question of retroactivity separately for each provision of the Antiterrorism and Effective Death Penalty Act, concluding that some provisions of the statute would present no retroactivity problem while other provisions, which affected substantive rights, were subject to a presumption against retroactive application. See id. at 2289.

b. The Supreme Court's Hughes and St. Cyr decisions confirm the approach adopted by this Court in Carl Marks. Under Hughes and St. Cyr, some provisions of the FSIA – such as the service of process and removal provisions – are purely procedural and presumptively apply to all litigation filed subsequent to the FSIA's effective date. Notably, the district court in Carl Marks assumed the applicability of these provisions to the litigation, even though it held that the commercial activity exception was not available on plaintiffs' pre-1952 claims. See Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323, 328-31 (S.D.N.Y. 1987) (discussing effectuation of service under 28 U.S.C. § 1608). Similarly, the FSIA's codification of common-law exceptions to immunity regarding waiver and counterclaims, which existed even before the Tate letter, see, e.g., Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 134-35 (1938), would apply regardless of when the claims arose. See Carl Marks, 841

F.2d at 27 (indicating that the district court could have exercised jurisdiction under a theory of waiver if plaintiffs had been able to show that the USSR had "consented to suit").

In contrast, the presumption against retroactivity precludes application of the FSIA's other exceptions in such a way as to "eliminate[] a defense to * * * suit" that existed at the time of the challenged conduct. Hughes, 520 U.S. at 948. Thus, the commercial activity exception, § 1605(a)(2), does not apply to a foreign states' commercial conduct that pre-dated the Tate Letter, Carl Marks, 841 F.2d at 27, but it does apply, as the Court suggested, to conduct after the Tate Letter because "after 1952 * * * it [was] reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transaction," ibid. See also Verlinden, 461 U.S. at 488 (FSIA "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity").[3]

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[3] Neither the language nor history of the FSIA contain the "clear indication," St. Cyr, at 2271, 2288-89, that would be required to overcome the presumption against retroactively applying provisions that eliminated the defense of sovereign immunity. See Carl Marks, 665 F. Supp. at 336. In one reference to timing, Congress delayed the effective date of the FSIA for ninety days after its enactment with the stated purpose of giving advance notice to foreign nations of the changes worked by the statute in the United States' law concerning foreign sovereign immunity. Pub. L. No. 94-583, § 8, 90 Stat. 2898 (1976); see H.R. Rep. No. 94-1487 reprinted in 1976 USCCAN 6604, 6632 (90-day period "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states"). This delay is, at the least, entirely consistent with an intent not to upset settled expectations. Congress's only other reference to timing was a statement in its findings that the "[c]laims of foreign

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c. The Ninth Circuit's recent holding in Altmann v. Austria, 2002 WL 31770999 (9th Cir. Dec. 12, 2002), that Austria could be sued under the FSIA for its conduct during the Nazi era is flawed in numerous respects. First, the Ninth Circuit mistakenly believed that Austria would not have been entitled to immunity for its Nazi-era conduct even prior to the 1952 Tate Letter. Id. at *7-*8. The court based this view in part on its understanding that during the pre-1952 period, immunity was only accorded to "friendly" foreign governments. Id. at *7. The court does not, however, cite any instance in which a non-consenting foreign sovereign was denied immunity because it was not "friendly," and we are aware of none. In fact, such an

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[3](...continued)
states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602 (emphasis added). This statement lacks sufficient clarity to overcome the presumption against retroactivity that applies to certain FSIA exceptions. Indeed, the Eleventh Circuit in Jackson v. People's Republic of China, stated that this language "appeared to be prospective" only and counseled against retroactive application. 794 F.2d at 1497.

More fundamentally, the point of the statutory statement is that questions of immunity would "henceforth be decided by courts," 28 U.S.C. § 1602 (emphasis added), rather than by the executive branch and based on legal principles rather than foreign policy considerations. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."). This general statement of purpose manifests no intent to deny immunity that would have been recognized for past sovereign conduct. See St. Cyr, 121 S. Ct. at 2288-89.

argument was expressly rejected in Wulfsohn v. Russian Socialist Federated Soviet Republic, 138 N.E. 24 (N.Y. 1923).

The Ninth Circuit further relied on the so-called "Bernstein Letter" as evidence that the United States would not have recognized Austria's immunity from suit even prior to the Tate Letter. In the Bernstein Letter, the State Department announced a policy "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Altmann, 2002 WL 31770999, *8 (quoting April 13, 1949 letter of Jack B. Tate, reprinted in Bernstein v. N.V. Nederlandshe-Amerikaansche, 210 F.2d 375, 376 (2d Cir. 1954)). The Bernstein Letter did not address the doctrine of foreign sovereign immunity, but rather the act of state doctrine.[4] While the United States did not recognize the validity of Nazi expropriations for purposes of the act of state doctrine, Nazi governments were still immune from suit on such claims in our courts. This Court has acknowledged the significance of the distinction. In Zwack v. Kraus Bros., 237 F.2d 255 (2d Cir. 1956), the Court recognized the Hungarian government's immunity from suit while declining, under the policy of the Bernstein letter, to recognize the validity of the challenged expropriation. See id. at 260-61.

[4] The defendant in Bernstein was a Dutch corporation, and the court had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." Bernstein, 210 F.2d at 375.

Finally, the Ninth Circuit cited the fact that certain of those responsible for Nazi atrocities had been prosecuted criminally at Nuremberg as evidence Austria's immunity would not have been recognized. See Altmann, 2002 WL 31770999, *9. But, the fact that individual Nazis could be criminally prosecuted in an international tribunal does not mean that Austria was subject to suit by private plaintiffs in American courts. Indeed, the conflation of these two issues is directly contrary to the Supreme Court's holding in Hughes. See 520 U.S. at 951 (defendant's prior susceptibility to suit by the government did not alter fact that new prospect of suit by private plaintiff was substantive change in the law).

The Ninth Circuit further held that application of later-adopted immunity exceptions was appropriate because it would not upset Austria's expectations at the time. The court noted that Austria had adopted the restrictive theory of immunity in the 1920s. Altmann, 2002 WL 31770999, *8. But that fact is irrelevant. The court does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts. As the Tate Letter stated, the U.S. had previously followed the "absolute" theory of immunity, under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." See Alfred Dunhill, 425 U.S. at 711. The Ninth Circuit's analysis makes a foreign government's susceptibility to

suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." Altmann, 2002 WL 31770999, *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory until later, would be immune). But there is no indication that Congress, in enacting the FSIA, desired different countries to be subject to distinct immunity rules. To the contrary, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

In sum, there was no basis for the district court to question the continued validity of this Court's holding in the Carl Marks case. Subsequent Supreme Court decisions confirm this Court's conclusion that the commercial activity exception does not apply retroactively to claims arising before the Tate letter regime was adopted.[5]

4. Nor may plaintiffs circumvent the rule against retroactivity by alleging that Austria has continued, since 1952, to refuse to pay compensation on claims that arose from Austria's

[5] Even if the commercial activity exception were applicable to the pre-Tate Letter period, that exception would not apply to the pre-1952 expropriation by Austria of property within its territory or to its participation in war crimes and crimes against humanity as alleged in the Complaint. These are not the type of "commercial activity" that Congress intended to fall within that exception to the FSIA. See Saudi Arabia v. Nelson, 507 U.S. 349, 358-63 (1993); Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964); Joo v. Japan, 172 F. Supp. 2d 52, 61-64 (D.D.C. 2001); Haven v. Rzeczpospolita Polska, 68 F. Supp. 2d 947, 954 (N.D. Ill. 1999), aff'd, 215 F.3d 727 (7th Cir. 2000).

pre-1952 conduct. See Order of June 5, 2002, at 3 (citing 1st Amended Compl. ¶¶ 16-18, 24). Plaintiffs do not allege that their claims are based on any commercial dealings with Austria since 1952. Rather, they allege that since 1952, Austria has followed an official policy "to delay, impede, thwart and at any cost avoid and evade restitution or recompense to Austria's Jews" for wrongs committed during the 1938-45 period. 1st Amended Compl. ¶ 16. Contrary to the district court's view, a present failure to make compensation on claims that are themselves barred does not constitute an independent basis for bringing suit. If that were the law, then statutes of limitation would be toothless, as plaintiffs could merely allege a new claim based on the present refusal to pay on the time-barred one.

To the extent that the district court believed plaintiffs could assert a claim based upon Austria's alleged breach of its undertaking in the 1955 Treaty with the United States to make restitution to Holocaust victims, see 1st Amended Compl. ¶ 20, that view would also be contrary to settled law. As an initial matter, treaties, even when they benefit private persons, are not presumed to create individually enforceable rights. See, e.g., United States v. De La Pava, 268 F.3d 157, 164 (2d Cir. 2001). The 1955 Treaty creates no rights that are judicially enforceable by an individual in a court of the United States. Further, a foreign government's failure to enact legislation to make adequate war claims restitution would be a quintessentially

"public" act as to which Austria would have had immunity, even under the Tate Letter regime. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (under Tate Letter, foreign sovereigns continued to enjoy immunity from suit with regard to "legislative acts"). Thus, even if plaintiffs could state a claim for breach of the 1955 treaty, such a claim would not come within the FSIA's commercial activity exception. See Wolf v. Federal Republic of Germany, 95 F. 3d 536, 543-44 (7th Cir. 1996) (Germany's alleged failure to fulfill international promises to compensate Holocaust victims was not commercial activity for purposes of the FSIA).

B. Under Circuit Precedent, Neither May The FSIA's Expropriation Exception Be Applied to Austria's Conduct At Issue Here.

The Court's reasoning in Carl Marks applies with equal force to plaintiffs' contention that the district court may exercise jurisdiction over Austria's Nazi-era expropriations under the expropriation exception of the FSIA, 28 U.S.C. § 1605(a)(3). See Garb v. Republic of Poland, 207 F. Supp. 2d 16, 27 (E.D.N.Y. 2002) (to the extent § 1605(a)(3) "overruled prior law, the holding in Carl Marks makes clear that it cannot be applied retroactively").[6]

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[6] The expropriation exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(continued...)

American law did not recognize an expropriation exception to foreign sovereign immunity in the 1930s or 40s, at the time Austria is alleged to have taken plaintiffs' property. As the Tate Letter made clear, prior to 1952, the United States adhered to the "absolute theory of sovereign immunity," under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." Alfred Dunhill, 425 U.S. at 711 (reprinting Tate Letter). See also Verlinden, 461 U.S. at 486. Thus, application of the FSIA's expropriation exception to Austria's Nazi-era expropriations would have the same substantive effect on settled rights as would retroactive application of the commercial activity exception.

In fact, even the restrictive theory of immunity adopted in the 1952 Tate Letter did not recognize an exception to immunity for suits based upon a foreign government's expropriation of

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[6](...continued)

> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

28 U.S.C. § 1605(a)(3).

Plaintiffs only explicitly invoked the expropriation exception in their Second Amended Complaint. For the reasons stated, however, this amendment cannot save their jurisdictionally deficient claims against Austria.

property within its territory. In the Altmann decision, the Ninth Circuit asserted, without authority, that expropriation claims could be brought under the restrictive theory of immunity. See 2002 WL 31770999 at *9 (positing that because Austria had adopted the restrictive theory in the 1920s, it "could have had no reasonable expectation of immunity in a foreign court" as to an expropriation claim). To the contrary, however, the expropriation exception to sovereign immunity was not recognized in U.S. law until the FSIA's enactment in 1976. In Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), the Court held that even under the restrictive theory foreign sovereigns enjoyed immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, such as nationalization." Id. at 360 (emphasis added).[7] See also Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2d Cir. 1971) (quoting same). Thus, under the reasoning of Carl Marks, the expropriation exception should not apply to any conduct pre-dating the FSIA.

[7] Plaintiffs' Complaint is replete with allegations that acknowledge that Austria's policy of expropriating or "Aryanizing" the property of its Jewish citizens was the official policy of Austria, adopted through its laws and regulations. See, e.g., 1st Amended Compl. ¶ 8 (listing decrees and laws of the Austrian government that deprived Jews of their property); 2nd Amended Compl. ¶ 9 (same).

Nor can plaintiffs assert claims based upon Austria's continued refusal, post-1976, to return or pay compensation for property it had expropriated in the 1930s and 40s. As the Federal Circuit has held, a takings claim arises "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988); Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988). On this basis, the Federal Circuit has frequently dismissed takings claims as time-barred. See Fallini v. United States, 56 F.3d 1378, 1382-83 (Fed. Cir. 1995), cert. denied, 517 U.S. 1243 (1996); Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994); Steel Improvement & Forge Co. v. United States, 174 Ct. Cl. 24, 29-30 (1966); Stafford Ordnance Corp. v. United States, 123 Ct. Cl. 787, 793 (1952).[8] The same rationale

[8] The same principle applies under international law. International tribunals have held that a claim for breach of an obligation not to expropriate except upon payment of compensation accrues when the alien's property is taken and no compensation is paid or offered. See, e.g., Mondev Int'l Ltd. V. United States, ICSID No. ARB(AF)/99/1, at 19-20, paras. 60-61 (NAFTA Ch. 11 Trib. Oct. 11, 2002) (because alleged expropriation was complete before the NAFTA went into effect, no claim for expropriation could be brought under the NAFTA) [the tribunal's opinion can be found at http://www.state.gov/documents/organization/14442.pdf]; Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J. (ser.A/B) No. 74 at 25-27 (June 14) (court lacked jurisdiction over claim based on expropriation of Italian nationals' investments resulting from 1920 monopolization of phosphate industry, where court's jurisdiction was limited to facts or situations subsequent to

precludes plaintiffs from asserting claims now, under an immunity exception adopted in 1976, based upon takings that were completed some sixty years ago.

C. Under This Court's Clear Precedent, Austria Has Not Waived Its Immunity From Suit.

With respect to waiver, in their First Amended Complaint, the plaintiffs argued only that Austria had impliedly waived its immunity by violating preemptive norms of international law, referred to as jus cogens. See 1st Amended Compl. ¶¶ 44, 99 (page 50). That argument, like plaintiffs' others, is foreclosed by precedent. In Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996), plaintiffs argued that Libya should be deemed to have impliedly waived its sovereign immunity by taking part in the bombing of Pan Am Flight 103. This Court rejected that argument, holding that "Congress's concept of an implied waiver * * * cannot be extended so far." Id. at 244. The other courts of appeals to consider the issue have, likewise, uniformly agreed that a government's violations of jus cogens norms does not imply a waiver of its immunity from suit. See Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir. 2001); Princz v. Federal Republic of Germany 26 F.3d 1166, 1173-74 (D.C. Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 721 (9th Cir. 1992).

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[8](...continued)
1931).

In plaintiffs' Second Amended Complaint, they further argue that Austria waived its immunity by entering into the recent executive agreement with the United States, pursuant to which the United States agreed to urge American courts to dismiss World War II-era claims against Austria and Austrian companies. See 2nd Amended Compl. at ¶¶ 55, 57. This argument must be rejected as contrary to the express language of the agreement. Far from consenting to adjudication of Nazi-era claims by American courts, Austria obtained a commitment from the United States to "take appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to any claim that may be asserted against the Republic of Austria involving or related to" claims covered by the General Settlement Fund. January 17, 2001 Joint Statement, 3.c (incorporating by reference Art. 3(3) of the Reconciliation Fund Agreement (emphasis added)).

* * *

Because none of the FSIA's exceptions apply to plaintiffs' claims against the Republic of Austria, the general rule of foreign sovereign immunity codified in § 1604 of the FSIA bars litigation of plaintiffs' claims in United States courts.[9]

[9] We do not address here the separate question whether petitioners Dorotheum Gmbh & Co Kg,and Osterreichische Industrieholding, AG are entitled to invoke Austria's immunity from suit.

II. INTERLOCUTORY REVIEW OF AUSTRIA'S CLAIM OF IMMUNITY IS APPROPRIATE, ESPECIALLY IN LIGHT OF THE UNITED STATES' EXECUTIVE AGREEMENT WITH AUSTRIA.

A. The Court of Appeals should exercise interlocutory review of the district court's refusal to recognize Austria's immunity from suit.[10] As the Court has previously held, the denial of a foreign sovereign's motion to dismiss on sovereign immunity grounds is subject to interlocutory appeal under the collateral order doctrine. See Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 147 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992). Interlocutory review of a denial of immunity is appropriate because the foreign government's immunity is "an immunity from trial and the attendant burdens of litigation and not just a defense to liability on the merits." Formost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990), cited in Weltover, 941 F.2d at 147.

Under this precedent, the district court's orders are appealable as a matter of right. The district court has conclusively rejected Austria's argument that it is entitled to immunity as a matter of law on the basis of the precedent cited above. Although the district court has not definitively rejected the possibility that Austria may be entitled to immunity on some theory, the alternative grounds that it holds open for recognizing Austria's immunity are extremely fact-intensive and

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[10] Austria filed a Notice of Appeal on November 7, 2002, Docket Number 02-9361, and has moved to consolidate the appeal with Austria's contemporaneously-filed petition for mandamus.

bound up with the ultimate merits of plaintiffs' suit. For instance, there is still a possibility that plaintiffs will not be able to prove that Austria's commercial activity had, as a factual matter, a sufficient nexus with the United States to satisfy 28 U.S.C. § 1605(a)(2). Thus, the court has ordered Austria to subject itself to extensive discovery into the facts of plaintiffs' allegations. Austria should not be subjected to the burdens of discovery on alternative theories of immunity when it is plainly entitled to immunity as a matter of law under this Circuit's precedent. See Formost-McKesson, 905 F.2d at 443, cited in Weltover, 941 F.2d at 147.

B. If the Court were to conclude that Austria's appeal is for some reason not technically proper, the Court should instead exercise its authority to correct the district court's error by way of mandamus review. See In re Austrian & German Holocaust Litig., 250 F.3d 150, 162 (2d Cir. 2001) (mandamus available "to confine an inferior court to a lawful exercise of its prescribed authority"). The D.C. Circuit has recognized the propriety of mandamus review in circumstances such as these. See In re Papandreau, 139 F.3d 247, 254 (D.C. Cir. 1998) (granting mandamus to quash FSIA jurisdictional discovery where dismissal might be proper on other grounds that would not have required discovery).

Mandamus review is particularly appropriate here, where the plaintiffs' claims are the subject of international agreements in which the United States has agreed to support Austria's assertion

of its immunity. As noted above, the United States and Austria have entered into an executive agreement, which recognizes Austria's creation of the GSF to make payments to certain victims of the Nazi-era, including those, like plaintiffs, whose property was confiscated or "Aryanized." The executive agreement makes clear that the United States' foreign policy supports an "all-embracing and enduring legal peace" for Austria and Austrian companies with respect to claims such as plaintiffs in favor of the remedy provided by the GSF. Exchange of Notes at 2. Specifically, with respect to claims covered by the GSF, the United States has committed itself to "take appropriate steps to oppose any challenge to the sovereign immunity of Austria." Reconciliation Fund Agreement, Art. 3(3), incorporated by reference in Exchange of Notes.

In fact, as the United States informed the district court, payments under the fund will not begin until all prior-pending litigation in American courts has been dismissed. Exchange of Notes, Annex A, ¶ 2. The continued pendency of plaintiffs' claims impairs the success of this important foreign policy initiative and further delays dignified payments to these victims of the Nazi era. The district court's failure to recognize Austria's entitlement to immunity should not stand as an impediment to the fulfillment of the executive agreement's purposes. See In re Austrian & German Holocaust Litig., 250 F.3d at 162-65.

CONCLUSION

This Court should issue an order directing the district court to dismiss plaintiffs' claims against the Republic of Austria for lack of jurisdiction.

Respectfully submitted,

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DECEMBER 20, 2002

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing Brief for the United States as Amicus Curiae is monospaced, has 10.5 or fewer characters per inch and contains 6,805 words, according to the count of Corel Wordperfect 9.

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Douglas Hallward-Driemeier

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2002, I caused to be dispatched the original and nine (9) copies of the foregoing Brief for the Amicus Curiae the United States of America in Support of Petitioners to the Clerk of this Court by Federal Express. On the same date, I served two copies of the brief on the following counsel by Federal Express:

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